Supreme Court, U.S.
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No. 85-230

In the Supreme Court of the United States

October Term, 1985

EMERY AUTHIER, JR.,
Petitioner

vs.

FRED M. GINSBERG,
AMERICAN STEEL CORPORATION
and NATIONAL STEEL CORPORATION,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Brief in Opposition to Petition for Writ of Certiorari

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COUNTERSTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

DOES SECTION 514(a) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA"), 29 U.S.C. § 1144(a), PREEMPT A STATE COMMON LAW ACTION IN TORT FOR WRONGFUL DISCHARGE WHEN ERISA ITSELF CREATES A SUBSTANTIVE ELEMENT OF THE STATE CAUSE OF ACTION AND THE ACTION TURNS UPON AN INTERPRETATION OF THE SCOPE OF A FIDUCIARY'S DUTIES UNDER ERISA?

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ANSWERED "YES."

STATEMENT OF CORPORATE AFFILIATION

Respondent, National Steel Corporation, is owned by National Intergroup, Inc. and Nippon Kokan K.K. The following is a listing of all non-wholly owned subsidiaries and affiliates of National Steel Corporation:

Carryore, Limited
Concast Holding, A.G.
Donner-Hanna Coke Joint Venture
Economy Fuel and Supply Corporation
Iron Ore Company of Canada
Iron Ore Land Company
Mathies Coal Company
The Mesaba-Cliffs Mining Company
Pilot Knob Pellet Company
Presque Isle Corporation
Taylor Devices, Inc.

Respondent, American Steel Corporation, is a wholly owned subsidiary of National Steel Corporation.

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STATUTES

Employee Retirement Income Security Act
of 1974, Pub. L. No. 93-406, 88 Stat. 829,
29 U.S.C. Section 1001 *et seq*:

Section 514 1

No. 85-230

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ON PETITION FOR WRIT OF CERTIORARI
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Brief in Opposition to Petition for Writ of Certiorari

Respondents Fred M. Ginsberg, American Steel Corporation and National Steel Corporation submit this brief in opposition to the Petition for Writ of Certiorari filed by Petitioner Emery Authier, Jr., Appellee below, in the action captioned *Emery Authier, Jr. v. Fred M. Ginsberg, American Steel Corporation and National Steel Corporation*, No. 85-230. The Opinion of the United States Court of Appeals for the Sixth Circuit is published at 757 F.2d 796 (6th Cir. 1985).

PERTINENT STATUTE

Section 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a), states as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

SUMMARY OF ARGUMENT

Pursuant to Rule 17 of the Rules of the Supreme Court of the United States, review on writ of certiorari should not be granted because the decision of the Court of Appeals does not conflict with any decision of this Court or any federal court of appeals and does not present an important question of federal law for this Court.

The Sixth Circuit's holding that ERISA's preemption clause, 29 U.S.C. § 1144, preempts a state common law tort action for wrongful discharge based on ERISA is consistent with this Court's decision in *Alessi v. Raybestos-*

Manhattan, Inc., 451 U.S. 504 (1981) and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) and with numerous decisions of other federal courts of appeals. Authier's suggestion that the Court of Appeals' holding deprives ERISA fiduciaries of any remedy is based on the incorrect premise that the Sixth Circuit held that ERISA itself provided no remedy. In fact, the Sixth Circuit stated twice that the issue of whether ERISA itself provided any remedy was not before it and, consequently, was not decided. Likewise, that issue is not ripe for this Court's review.

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

American Steel Corporation ("American") became a wholly-owned subsidiary of National Steel Corporation ("National") in 1973. Fred Ginsberg ("Ginsberg") was chief executive officer at American at all times pertinent to this action. Petitioner Emery Authier ("Authier"), as chief financial officer at American, reported directly to Ginsberg. Authier had been instructed, on several occasions, to clear all correspondence of a non-routine nature with Ginsberg prior to transmittal.

In 1978, Authier was appointed to serve on the Administrative Committee of the American Steel Profit Sharing Plan (the "Plan"), along with National's General Counsel and its Vice-President for Finance, both of whom worked at National's Pittsburgh headquarters. As Secretary of the Committee, Authier had various recordkeeping functions, including the preparation of a yearly funding statement. National's procedures regarding pension plans required that Authier provide such documents to National executives Ronald Doerr ("Doerr") and Thomas Rudd

("Rudd") for review prior to submission to the other administrators.[1]

In the fall of 1979, National announced that it would terminate the Plan and bring American employees under National's pension program. National's policy regarding the assets of terminated plans was to retain them for distribution as retirement benefits for plan participants.

However, in January, 1980, Authier prepared a funding letter for calendar year 1979 indicating that the assets of the Plan would be distributed to participants upon termination. He submitted this letter to his co-administrators for signature without first reviewing it with Doerr or Rudd. He then informed Plan participants that the Plan's assets would be distributed. Because of Authier's actions, National felt obliged to distribute the assets, despite its general policy to the contrary.

In September of that same year, Authier again tried to circumvent Doerr and Rudd. On this occasion, he submitted to his co-administrators for signature a letter agreeing to indemnify the Plan Trustee against claims arising out of the distribution of Plan assets. Authier had no authority to execute such a document. Because Rudd found out about this indemnification letter before it was signed, he was able to put a stop to it.

On October 6, Authier prepared a memorandum which recommended that the company use a particular law

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[1]Ronald Doerr was Vice-President for Finance at National's Great Lakes Steel Division in Michigan. Authier had specific reporting requirements to Doerr. Thomas Rudd held the position of Assistant Vice-President, Industrial Relations with National in Pittsburgh and, as such, was involved with the administration of employee benefits for National. He was the liaison person through whom Authier was supposed to work in performing his duties as a plan administrator.

firm "if a decision is made to terminate and distribute." Although no Plan participants had requested such information, Authier distributed the memorandum to a few (but by no means all) Plan participants; and he did this without first reviewing it with his superior, Ginsberg, despite his longstanding orders to review correspondence with Ginsberg. Testimony at trial revealed that this disturbed Authier's supervisors because: (1) Authier had interjected himself into matters that were not within his responsibilities inasmuch as the decision to terminate the Plan and distribute its assets, and the selection of which law firm would handle the termination were matters left under the terms of the Plan to the corporation, not the Administrative Committee; (2) Authier had again ignored the proper chain of command, bypassing Ginsberg when he fully realized that Ginsberg would not have approved the memorandum; and (3) the memorandum put the company in a bad light with American employees because it implied to Plan participants that the decision to terminate the Plan and distribute its assets was not final, even though Authier knew that the decision had been finalized and that an announcement to that effect had previously been made to participants in September.

These occurrences, including the October 6 memorandum, together with a subsequent incident in which Authier once again disobeyed his immediate superior's directions, ultimately led to Authier's discharge on November 11, 1980.

B. The Proceedings Below

In February 1981, Authier filed a Complaint in Wayne County, Michigan Circuit Court against American, National and Ginsberg. The action was then removed to

Federal District Court for the Eastern District of Michigan. The Complaint contained allegations under both ERISA and the state common law which centered on Authier's claim that discharging him for writing and circulating the October 6 memorandum was, in essence, discharging him for carrying out his duties as an administrator of an ERISA covered pension plan.[2] The district court dismissed the Complaint insofar as it alleged that Authier's discharge violated ERISA itself, holding that Authier had no cause of action under ERISA. Authier never challenged this holding.

The district court submitted the case to the jury on a theory of wrongful discharge under Michigan law which recognizes a cause of action for a termination in violation of some clear mandate of public policy. *Suchodolski v. Michigan Consolidated Natural Gas*, 412 Mich. 692, 316 N.W. 2d 710 (1982).

Defendants contended at trial, as they have maintained on appeal, that Authier's discharge was based upon his repeated violation of legitimate company policies. Defendants asserted that Authier was not acting pursuant to any statutory duty imposed by ERISA when he wrote and circulated the October 6 memorandum. Defendants argued that Authier's alleged status as a fiduciary under ERISA did not accord him freedom from accountability for the insubordinate manner in which he carried out his duties as an employee and also that there was no showing, or even suggestion, that the defendants were trying to avoid any obligation under ERISA or to impede proper

[2]The Complaint also alleged breach of a lifetime employment contract and conspiracy. The trial judge granted a directed verdict as to defendants National and American on the conspiracy count. The jury found that Authier did not have an employment contract for life.

plan administration through terminating Authier. Indeed, Authier acknowledged that he was not contending that any Plan participant failed to receive, in a timely fashion, any information or benefit required by the Plan or by ERISA.

Nevertheless, the jury returned a verdict in Authier's favor based on the finding that Authier had been discharged for fulfilling his duties under ERISA.

Defendants appealed to the United States Court of Appeals for the Sixth Circuit. A panel of that court ordered the judgment of the district court vacated, and remanded the case for dismissal of the complaint. Rehearing *en banc* was denied.

In its Opinion, the court first examined the issue of whether Michigan law would provide a cause of action for discharging a fiduciary for compliance with his duties under ERISA. It held that the provisions and underlying policy of ERISA would constitute an "important and clearly articulated policy under Michigan law," the violation of which would give rise to a cause of action for wrongful discharge in Michigan.

The court went on to hold, however, that ERISA would preempt such a state cause of action. This holding was based upon the decisions of this Court in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), broadly construing ERISA's preemption provision, 29 U.S.C. § 1144(a), which states that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The court reasoned that Authier's asserted cause of action "relates to" an employee benefit plan within the meaning of this provision because "ERISA created a substantive element of the Michigan

action and since the action turns upon a fiduciary's duties under ERISA . . . ." 757 F.2d at 800. The court further reasoned that this result was consistent with the policy of ERISA because Congress clearly meant to make the enforcement of the duties and obligations of ERISA, as well as the protection of pension plan beneficiaries and participants, matters solely of federal concern. 757 F.2d at 801-02. Finally, the Court of Appeals determined that due to the divergence in state laws regarding the tort of wrongful discharge, state law wrongful discharge actions based on ERISA would create inconsistency in the interpretation and enforcement of ERISA, and, thus, defeat Congress' desire to establish a uniform federal law regulating pension plans. 757 F.2d at 802.

Because Authier had not appealed the dismissal of his federal claims, the Court of Appeals specifically left open the question of whether ERISA itself, either directly or by implication, would afford a cause of action to a fiduciary allegedly discharged for fulfilling his statutory duties under ERISA. 757 F.2d at 301 n.9; 757 at 802 n.11.

PETITIONER HAS OFFERED NO SPECIAL OR IMPORTANT REASON FOR REVIEW OF THE DECISION OF THE COURT OF APPEALS

A. The Decision Below Does Not Conflict With the Decisions of Other Circuits or of This Court

Authier's argument that the Court of Appeals misapplied the precedents of this Court is wholly unconvincing. *Alessi v. Raybestos-Manhattan, Inc.* and *Shaw v. Delta Airlines, Inc.*, stand as unequivocal pronouncements that the preemption provisions of ERISA are to be given an expansive reading by the courts, for this was Congress' clear intent. Under ERISA, State laws are preempted if they

"relate to" an ERISA-regulated pension plan. 29 U.S.C. § 1144(a). As the Court of Appeals noted, this Court stated in *Shaw* that "Congress used 'related to' in its broadest sense . . . , and, therefore, if a State law has 'a connection with or reference to' an ERISA plan, it is preempted . . . ." 757 F.2d at 800.

In this case, the state wrongful discharge theory under which Authier was permitted to proceed had but one public policy foundation: the enforcement of ERISA itself. The trial enmeshed the court and jury, applying state law, in deciding important issues related to ERISA and the Plan itself, such as the scope and extent of Authier's duties under both ERISA and the Plan. The Court of Appeals appropriately concluded that the possibility that state courts may decide such issues, as well as the possibility that different states may afford different remedies for fiduciaries under the same factual circumstances, cannot be squared with Congress' stated purpose in enacting ERISA: the establishment of a uniform federal law regulating pension plans.

The decision in this case comports with the decisions of other courts that have applied § 1144(a) in light of this Court's precedent. Indeed, this decision merely reflects an established consensus that state common law claims in any way related to ERISA are preempted. *See, e.g., Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985) (ERISA preempts state claims for fraud, unjust enrichment, promissory estoppel, quantum meruit and breach of contract); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985) (ERISA preempts state claim for breach of implied covenant of good faith and fair dealing); *Lojek v. Thomas*, 716 F.2d 675 (9th Cir. 1983) (ERISA preempts state common law on anticompetition clauses in pension

plans); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.) *cert. denied* 454 U.S. 968 (1981) (ERISA preempts state action for interference with contract); *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984) (ERISA preempts state claim for *prima facie tort); King v. James River-Pepperell, Inc.*, 593 F. Supp. 1344 (D.Mass. 1984) (ERISA preempts state wrongful discharge action); *UAW District 65 v. Harper & Row, Inc.*, 576 F. Supp. 1468 (S.D. N.Y. 1983) (ERISA preempts state claims for conversion, unjust enrichment, common law fraud and tortious interference with contract); *Ovitz v. Jefferies & Co., Inc.*, 574 F. Supp. 488 (N.D. Ill. 1983) (ERISA preempts state common law actions for breach of fiduciary duty and breach of contract); *Ogden v. Michigan Bell Telephone Co.*, 571 F. Supp. 520 (E.D. Mich. 1983) (ERISA preempts state claim for common law fraud); *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745 (N.D. Ga. 1983) (ERISA preempts state claim for breach of contract and breach of fiduciary duty). The Court of Appeals, in this case, thus breaks no new legal ground and its decision presents no issue warranting review by the Court.

The precedents cited by Authier in support of the proposition that the Court of Appeals has interpreted 29 U.S.C. 1144(a) too broadly are readily distinguishable and, in fact, were distinguished by the court below, in footnote 6 of its opinion. The Sixth Circuit aptly observed therein that cases such as *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979), *Operating Engineers' Local #428 Pension Trust Fund v. Zamborsky*, 650 F.2d 196 (9th Cir. 1981), and *Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981) represent a discrete line of cases in which courts have held that ERISA was not intended to preempt state regulation

of domestic affairs. The entire field of domestic relations is generally recognized to be the traditional domain of the individual states and, accordingly, "courts generally interpret statutes with the presumption that Congress did not intend to interfere with state domestic relations law." *Zamborsky*, 650 F.2d at 199. However, this has been characterized as a "remote and peripheral exception" which must be construed narrowly. *Authier*, 757 F.2d at 800, n.6; *Stone & Webster Eng'g. Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd* 463 U.S. 1220 (1983).

Employment law, on the other hand, has long been subject to extensive federal regulation. Federal preemption of cases involving the termination of an employee allegedly for performing his duties under ERISA does not represent federal intrusion into the realm of basic state police power. Consequently, the Court of Appeals was entirely correct when it found that "this case does not fall within the peripheral and remote exception." 757 F.2d at 800 n.6

B. Contrary to Authier's Implication, the Court of Appeals Did Not Reach the Issue of Whether Federal Law Would Have Afforded Petitioner a Cause of Action, and This Issue Is Not Presented for Review.

Authier's petition suggests that this case is deserving of review because, if the Court of Appeals is correct in ruling that Authier's state wrongful discharge action is preempted, there will be no remedy for fiduciaries who are terminated for carrying out duties prescribed by ERISA. The assumption underlying such an argument, of course, is

that federal law does not provide a remedy in such circumstances.[3] Authier argues this point at some length in an effort to lay a logical foundation for his argument that "states must be free to provide for their workers' welfare in this area." *See* Petition for Writ of Certiorari, pp. 14-17.

Whether or not federal law provides such a remedy is simply not at issue in this case, however, because Authier chose not to appeal the dismissal of the claim that his discharge violated ERISA. Indeed, contrary to holding that Authier had no federal cause of action, the Court of Appeals acknowledged a possibility that "Authier may have been able to assert an action against Ginsberg under 29 U.S.C. § 1109(a) (1984) (liability of fiduciary for breach of duty) for discharging him wrongfully." However, the court refrained from further addressing or deciding this issue because it was not raised in the pleadings or briefs of the parties. *Id.*

The Court of Appeals also specifically pointed out that it was not deciding the issue of whether a cause of action could be implied from ERISA:

> The district court held that a cause of action could not be implied from ERISA in favor of fiduciaries discharged for fulfilling their statutory duties. Since the

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[3]It should be noted that a finding that Congress did not provide a particular remedy as part of the ERISA enforcement scheme does not warrant the conclusion that Congress meant to permit the states to provide such a remedy. "Congress can choose to regulate a field by limiting the number of remedies as well as by expanding them, and that is precisely what it has done here." *Ovitz v. Jefferies & Co., Inc.*, 547 F. Supp. 488, 491 (N.D. Ill. 1983) (ERISA preempts state causes of action for breach of fiduciary duty and breach of contract.) *Cf. Massachusetts Mutual Life Insurance Co. v. Russell*, _____ U.S. _____, 105 S.Ct. 3085 (1985). (A private right of action for extracontractual damages should not be implied even though such a remedy is not expressly authorized by ERISA.)

> appellee failed to raise this issue on appeal, we make no determination as to the correctness of this holding.

757 F.2d at 802 n.11.

It is quite apparent, therefore, that Authier's arguments are simply an attempt to manufacture an "important and substantial" federal question for review. The issue appealed to the Court of Appeals, and the issue decided therein, was whether Petitioner's state cause of action for wrongful discharge was preempted by ERISA. As shown above, the court's decision on this point is neither novel nor controversial. The issue of whether either ERISA itself or the evolving federal common law of pensions[4] would provide a cause of action based upon Petitioner's allegations was not before the Court of Appeals. As a consequence, that issue is not ripe for review by this Court in the instant case.

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[4]Congress intended that the courts fashion a body of federal common law to govern pensions. *See Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985); *Murphy v. Heppenstall Co.*, 635 F.2d 233, 237 (3d Cir. 1980), *cert. denied* 454 U.S. 1142 (1982); *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 972-73 (5th Cir. 1981). *See also* 120 Cong. Rec. 29, 942 (1974) (Remarks of Sen. Javits that federal substantive law will be developed to deal with issues involving rights and obligations under private pension system.)

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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